# Commonwealth of Kentucky
# Workers' Compensation Board

**OPINION ENTERED: October 21, 2013**

CLAIM NO. 201091018

STANDARD PARKING PETITIONER

VS. **APPEAL FROM HON. WILLIAM RUDLOFF, ADMINISTRATIVE LAW JUDGE**

TINA UPTON
and HON WILLIAM RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

**OPINION**
**VACATING IN PART AND REMANDING**

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BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

**RECHTER, Member.** Standard Parking ("Standard") appeals from the January 22, 2013 Opinion and Order rendered by Hon. William J. Rudloff, Administrative Law Judge ("ALJ"), awarding Tina M. Upton ("Upton") temporary total disability benefits, permanent partial disability benefits, and

medical benefits. Standard also appeals from the March 22, 2013 Opinion and Order denying its petition for reconsideration. On appeal, Standard argues there is insufficient evidence to support an award of enhanced benefits pursuant to KRS 342.730(1)(c)1. We remand this matter to the ALJ.

Standard operates the employee and long-term parking lots at the Cincinnati/Northern Kentucky Airport. Upton has been employed by Standard as a bus driver since 1999. Though she typically operated the employee parking shuttle, she would occasionally be assigned to the long-term parking shuttle which requires the driver to assist passengers with luggage.

On March 26, 2010, Upton had been assigned for the day to the long-term lot because of the busy spring break period. She was assisting a passenger with a particularly large piece of luggage when she felt a pulling sensation in her left shoulder and back. She finished the shift, hoping the pain would resolve, but it did not. Upton then reported her injury and was initially sent to physical therapy, but experienced no relief. Eventually, Upton underwent surgery to repair a torn rotator cuff and additional physical therapy. Because her pain persisted, she later underwent a second rotator cuff repair with

clavicle resection, removal of the AC joint and extensive debridement.

Dr. John Larkin performed Upton's second shoulder surgery. Three months later, he released her to conditional duty with no lifting over seventy pounds. A year after her surgery, he assessed a 6% whole person impairment according to the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides") and released Upton to work with no functional limitations. Dr. Steven Wunder conducted an independent medical evaluation of Upton a year after the second surgery was performed. Referencing the AMA Guides, Dr. Wunder assessed a 9% whole person impairment and opined Upton can tolerate modified employment with no heavy lifting, pushing or pulling of luggage.

With respect to her current condition, Upton testified she continues to experience some pain when lifting, some discomfort when driving the bus, and reduced strength. She is unable to effectively assist passengers with luggage, or to perform certain household tasks involving pulling or reaching. Since her return to work, Standard has restricted Upton to driving only the employee shuttle bus, which requires no luggage handling.

In an opinion rendered July 12, 2012, the ALJ awarded Upton temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits and medical benefits. Standard appealed. In an opinion rendered December 14, 2012, this Board affirmed the award of TTD and medical benefits, but remanded the case for clarification regarding application of the three multiplier pursuant to KRS 342.730(1)(c)1.

Upon remand, the ALJ again determined that the facts supported application of both KRS 342.730(1)(c)1 and KRS 342.730(1)(c)2. The ALJ then properly proceeded to the third prong of the analysis required by Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003); that is, a determination of which provision is more appropriate to the particular circumstances of Upton's case. In determining the three multiplier found at KRS 342.730(1)(c)1 is more appropriate, the ALJ explained:

> I, therefore, make the factual determination that the provisions of KRS 342.730(1)(c)1 are appropriate, since [Upton] did return to work at the same or greater wage, but is unlikely to be able to continue for the indefinite future to do work from which to earn such a wage. In making those factual determinations, I rely on the totality of the evidence in the case, including [Upton's] sworn testimony and the medical evidence, and particularly

> the very persuasive and convincing medical report from Dr. Steven Wunder.

The sole issue raised on appeal is whether the evidence supported application of the three multiplier pursuant to KRS 342.730(1)(c)1. Standard does not challenge the ALJ's finding that both the two and three multiplier apply in this case. Rather, it asserts there is no evidence to support the conclusion Upton is unlikely to be able to continue her work for the indefinite future.

In order to reverse the decision of the ALJ, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). It is well-established that this Board may not engage in fact-finding; that function lies within the exclusive province of the ALJ. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). Therefore, in order for this Board to conduct the requisite appellate analysis, the ALJ must articulate the specific evidence supporting his determination. Cornett v. Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991).

Unfortunately, in this matter, the ALJ has failed to set forth the basic facts upon which the ultimate conclusion was drawn so the parties, and this Board, are reasonably apprised of the basis of his decision. Mere

reference to the "totality of the evidence" is insufficient. Furthermore, it is unclear exactly what portions of Upton's testimony and Dr. Wunder's medical opinion support the conclusion her injury has "permanently altered her ability to earn an income." While the ALJ noted Upton lacks the capacity to perform heavy lifting, there is no analysis provided as to how this restriction impairs her ability to earn a living as a bus driver, particularly in light of the accommodations Standard has made for her. We have reviewed the ALJ's summation of the evidence, and there is no reference which would reasonably support this conclusion. This Board is without authority to further cull the record in an effort to identify supporting evidence, as this would amount to fact-finding.

Accordingly, that portion of the ALJ's January 22, 2013 Opinion and Order enhancing the award of PPD benefits by the three multiplier is vacated. This claim is **REMANDED** to the ALJ with directions to more specifically identify the evidence upon which he bases the conclusion that Upton will be unlikely to earn her current wage for the indefinite future. The Kentucky Supreme Court has identified certain factors to consider in completing this task. These factors include the claimant's lack of physical capacity to return to the type of work he or she

performed at the time of injury, whether the post-injury work is done out of necessity, whether the post-injury work is performed outside of medical restrictions, and whether the post-injury work is possible only when the injured worker takes more narcotic pain medication than prescribed. Fawbush v. Gwinn, 103 S.W.3d 5, 12 (Ky. 2003).

ALL CONCUR.

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